(3)

No. 91-1614

MAY 12 1992
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

---

INDUSTRIAL RISK INSURERS,
*Petitioner,*

v.

COTTON BROTHERS BAKING COMPANY, INC.,
*Respondent.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

---

## REPLY TO BRIEF IN OPPOSITION

---

ROBERT M. WATTSON
(Counsel of Record)

LAWRENCE ZELLE
ZELLE & LARSON
City Center, Suite 4400
33 South 6th Street
Minneapolis, MN 55402
(612) 339-2020

LUCAS A. POWE, JR.
727 East 26th Street
Austin, TX 78705
(512) 471-5151

SEALE W. TUTTLE
85 Woodland Street
Hartford, CT 06102
(203) 520-6038

*Attorneys for Industrial Risk Insurers*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

10

## TABLE OF CONTENTS


| | Page |
|---|---|
| I. THE FIFTH CIRCUIT'S UNPRECEDENTED ACTIONS ARE NOT WITHIN THE CONTEMPLATION OF THE LAW OF ANY CIRCUIT.. | 1 |
| II. THE DECISION BELOW CONFLICTS WITH FED. R. APP. P. 40 AND VIOLATES DUE PROCESS | 3 |
| CONCLUSION | 6 |


## TABLE OF AUTHORITIES


*Cases:*

| | |
|---|---|
| *Ferguson v. Neighborhood Housing Services*, 780 F.2d 549 (6th Cir. 1986) | 4 |
| *Goldberg v. Kelly*, 397 U.S. 254 (1970) | 6 |
| *White v. Arco/Polymers, Inc.*, 720 F.2d 1391 (5th Cir. 1983) | 4 |

*Federal Rules:*

| | |
|---|---|
| Fed. R. App. P. 40(a) | 2, 5 |

*Miscellaneous:*

| | |
|---|---|
| Anthony Lewis, Gideon's Trumpet (1963) | 4 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

---

INDUSTRIAL RISK INSURERS,
*Petitioner,*

v.

COTTON BROTHERS BAKING COMPANY, INC.,
*Respondent.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

---

## REPLY TO BRIEF IN OPPOSITION

---

While agreeing with Petitioner that "the issues are procedural only" (Opp. at 10), Respondent argues first, that Industrial Risk Insurers (IRI) deserves to lose because the Fifth Circuit belatedly got the merits right (Opp. at 6-7, 11 n. 3) and, second, in any event, IRI has had more than enough process. (Opp. at 2, 8-9.) The former argument well reflects Respondent's view of procedural regularity: the end justifies the means. The latter is consistent with Respondent's effort to trivialize and regularize the actions of the Fifth Circuit.[1]

### I. THE FIFTH CIRCUIT'S UNPRECEDENTED ACTIONS ARE NOT WITHIN THE CONTEMPLATION OF THE LAW OF ANY CIRCUIT

Respondent embraces the Fifth Circuit's change of decision after its *sua sponte* recall of the mandate (Opp. at 6-7, 11 n. 3), yet shies away from admitting what hap-

---

[1] Thus, by the end of Respondent's Brief, they become "discretionary procedural steps." (Opp. at 11.)

pened. Thus, Respondent says the January 6 opinion simply "substituted new language on the credit issue" (Opp. at 2) when, in fact, the Fifth Circuit reversed the unanimous conclusion of its September 13 and October 10 opinions. Respondent's argument rests on two simple propositions: (1) courts do recall mandates, sometimes *sua sponte* (Opp. at 5-7) and (2) "courts have granted petitions for hearing without requesting a response." Opp. at 7.) Respondent also notes that no prior court has ever recalled a mandate to grant a previously denied petition for rehearing. (Opp. at 4-5.) While the latter is basic to Petitioner's proposition that the Fifth Circuit has gone beyond the law of all circuits, Respondent merges all the points to argue that every circuit would behave as the Fifth did if only given the chance.[2] Thus, Respondent would have this Court leave the ruling below untouched because, if given an opportunity, other circuits would (a) deny petitions for rehearing and issue the mandate; (b) *sua sponte* recall the mandate; (c) grant the previously denied petition for rehearing; (d) without calling for a response under Fed. R. App. P. 40(a); and (e) without any explanation for its change of position or procedural behavior.[3]

---

[2] "[T]he applicable case law confirms that the action taken by the Fifth Circuit here is well within the discretionary power vested in an appellate court." (Opp. at 5.) "In fact, ample precedent exists for everything which happened in the court below." (Opp. at 7.)

[3] Respondent basically admits there is no plausible legitimate theory of why the court changed its mind. Thus, Cotton Bros. suggests that either miscommunication between judges or judges and clerks or "the glaring arithmetical errors in the first opinion, noticed immediately by both parties and corrected by the Court in a second opinion on October 10, 1991, may have caused the Court to realize something was amiss, and that it should take another look at the case." (Opp. at 6 n.1.) That hardly explains why the court did not correct its previous errors, then and there, or at least call for additional briefing by the parties. Nor does it explain why the October 10 corrected opinion was so wrong it had to be reversed on January

This is exactly the argument IRI anticipated in the Petition for Certiorari and this is why IRI stated: "There is always a first time and this was it which then becomes precedent for the second unless it is checked. The need to halt such behavior represents the compelling reason for exercise of this Court's supervisory powers to intervene." (Petition at 4.) These are not merely "discretionary procedural steps" (Opp. at 11); they are unprecedented in American law and rightly so—for cumulatively, they exceed *any* standard of inherent discretion because they violate due process.

## II. THE DECISION BELOW CONFLICTS WITH FED. R. APP. P. 40 AND VIOLATES DUE PROCESS

Respondent also argues that IRI has used up its full allotment of due process over the years. (Opp. 2, 4, 8-9.) That, however, is not the issue. IRI does not contend it has lacked ample process in the proceedings through October 10; IRI's point is that it was denied due process under the Constitution and the Federal Rules of Appellate Procedure by what happened *after* October 10.[4]

Respondent's point is that IRI had its best shot and lost fair and square, first in the district court and ultimately at the Fifth Circuit. Thus, Respondent's conclusion: "This is not the track record of a litigant that has not been heard." (Opp. at 9, emphasis deleted.) Fully implicit in Respondent's argument is that IRI had nothing more to contribute and every court had fully considered its arguments. This, of course, is typical of arguments that treat the merits as controlling procedure and, thus, view due process as a procedural nicety to be waived in the interests of expeditious justice. Often, when someone reaches

---

6 nor why, if "something was amiss," the court issued its mandate 24 days later. If counsel for the Respondent can offer no more plausible rationale, it is not difficult to imagine what IRI believes.

[4] It is hardly surprising that Respondent limits its Rule 40 argument to a lame footnote bolstered by the weakest sentence being prefaced with "clearly." (Opp. at 7 n.2.)

the conclusion that due process may be dispensed with in the greater interests of justice, relevant data is never considered.[5] So, too, here. The instant litigation is about the amount of insurance proceeds owed Cotton Bros. as a result of a fire. The appellate litigation has turned on the issue of double recovery despite the fact the trial judge noted "[T]he issue of what part of these payments [to Cotton Bros.], if any, should be considered earning damages . . . has not been addressed by the parties." (R.E. No. 3, p. 39, ¶ 30.) The trial judge flat out missed the reason the issue was never addressed. From the filing of its complaints, Cotton Bros. had judicially admitted that it had no right to recover any amount in excess of the reduction in its gross earnings:[6] "prior to trial IRI paid a total of $3,585,762 to Cotton Brothers under its business interruption policy and is therefore *entitled to credit* for those payments." (Cotton Bros. Proposed Findings of Fact and Conclusions of Law, D.E. No. 418, p. 20.) (emphasis supplied) Because judicial admissions "eliminate the need for evidence on the subject matter of the admission," *Ferguson v. Neighborhood Housing Services*, 780 F.2d 549, 550-51 (6th Cir. 1986), and are conclusively binding on the party offering them, *White v. Arco/Polymers, Inc.*, 720 F.2d 1391 (5th Cir. 1983), IRI had offered no evidence.

Nevertheless, once the trial judge adopted a theory which ignored the judicial admission, Cotton Bros. embraced it fully. From that time onward, IRI has argued that by the law of the Fifth Circuit, Cotton Bros. is conclusively bound by its admissions. the trial judge did not discuss the point in his ruling on IRI's Assignments of Error. And the Fifth Circuit's opinions of September 13 and October 10 did not discuss the point because they

---

[5] Thus, we learn from A. Lewis, Gideon's Trumpet (1963) that Gideon was, in fact, innocent of the charges against him.

[6] The relevant portion of Cotton Bros.' Second Amended and Restated Complaint is reproduced as Appendix A hereto.

ruled on the double recovery issue by concluding the clear meaning of the policy language required IRI to prevail as a matter of law. (Appendix to the Petition for Certiorari at 9a, 13a.) Thus, any discussion of judicial admissions was unnecessary.

However, once a court considers ruling for Cotton Bros. on the double recovery issue, then discussion of the judicial admission point is mandatory. Yet, the January 6 opinion did not do so. Why not? The only plausible reason is that the court was so focused on the sole issue relied upon in Cotton Bros. Petition for Rehearing, it forgot there were other arguments.[7] That is why a response under Fed. R.App. 40(a) is so important. If the court had called for a response, IRI would have pointed out that there was an additional basis to support the court's September 13 opinion, *i.e.*, Cotton Bros.' judicial admissions *conclusively* resolved the double recovery issue.

Respondent is correct that IRI has been heard in this litigation. But on what became the dispositive issue after *sua sponte* recall of the mandate, IRI has not been heard: not one syllable in any court explains why Respondent's concession that IRI "is therefore entitled to credit for those payments" does not legally require that IRI *be* "entitled to credit for those payments."[8] A response, as required by the plain meaning of Rule 40(a)

---

[7] As in their Opposition in this Court, Cotton Bros. did not mention the judicial admission issue in its Petition for Rehearng.

[8] In its discussion of the judicial admissions point at the Fifth Circuit, Cotton Bros. argued its statements were not binding because: "the credit discussions in Cotton Bros.' pleadings which are alleged to be judicial confessions, however, are no more than counsel's arguments concerning the award which could be made by the trial judge. Arguments of counsel cannot bind any court to fall into legal error." Cotton Bros. Brief at 32. Cotton Bros. did not mention its Proposed Findings of Fact and Conclusions of Law, D.E. No. 418, p. 20: "prior to trial IRI paid a total of $3,585,762 to Cotton Brothers under its business interruption policy and is therefore entitled to credit for those payments."

would have precluded the Fifth Circuit's January 6 change of mind. That, in its most elementary sense, is why due process of law cannot be cavalierly tossed aside as the Fifth Circuit did and Respondent wrongly asserts every other circuit would.[9]

## CONCLUSION

The Petition for Certiorari should be granted and this case should either be set for argument on the questions presented or summarily reversed because once a mandate issues, a judgment entered is final.

Respectfully submitted,

ROBERT M. WATTSON
(Counsel of Record)

LAWRENCE ZELLE
ZELLE & LARSON
City Center, Suite 4400
33 South 6th Street
Minneapolis, MN 55402
(612) 339-2020

LUCAS A. POWE, JR.
727 East 26th Street
Austin, TX 78705
(512) 471-5151

SEALE W. TUTTLE
85 Woodland Street
Hartford, CT 06102
(203) 520-6038

*Attorneys for Industrial Risk Insurers*

Dated this 12th day of May, 1992.

---

[9] Respondent also notes and uses its appendices to bolster the point that after January 6, IRI has attempted to raise the issues presented in the Petition for Certiorari in various motions. Respondent's position is, therefore, that IRI has been heard on these issues. (Opp. 2-3, 9.) An application for discretionary relief which is summarily denied is not the substance of due process of law. Compare *Goldberg v. Kelly*, 397 U.S. 254 (1970).

## APPENDIX

## COTTON BROS.' SECOND AMENDED AND RESTATED COMPLAINT

11.

To date, defendant has paid plaintiff a total of $3,078,372.00 pursuant to its obligations under its business interruption insurance policy number 31-815935 issued to plaintiff herein. *Plaintiff has accepted this sum in partial payment of the actual losses it has sustained which are covered by the terms of defendant's business interruption policy.* However, plaintiff has maintained and continues to maintain that its insured business interruption losses far exceed the sum tendered to it by defendant.

12.

Plaintiff has supported its claim for additional payments under the terms of defendant's business interruption policy with a series of proofs of loss, reports and substantiating data, to wit:

(a) On March 1, 1982, plaintiff presented defendant with documented proofs of loss supporting *minimum* insured losses of $4,407,480.83 for the period from the occurrence of the fire through May 8, 1982;

(b) On May 31, 1983, plaintiff presented revised and refined data to defendant supporting *minimum* insured losses of $4,949,951.00 for the period from the occurrence of the fire through May 8, 1982; and

(c) On March 31, 1986, plaintiff presented defendant with an additional report, employing different methodology, supporting *minimum* insured losses of $4,921,619.00 for the period from the fire through May 8, 1982.

* * * *

13.

Despite the foregoing, defendant has failed and refused, and still fails and refuses, to make any additional payments to plaintiff under the business interruption policy at issue herein. Plaintiff therefore avers that defendant's refusal to pay plaintiff at least the sum of $1,329,108.83 (*being the difference between the lowest calculation of plaintiff's minimum insured losses and the amount paid to it by defendant*) is arbitrary, capricious and without probable cause.

(D.E. Nos. 168-171, ¶¶ 11, 12, 13) (Emphasis supplied).